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American Constitution Society

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Senator John Edwards

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It is so great to be here with you today.

I want to talk about the role of courts in our society. A fair and independent judiciary has deep roots in our country.

The Declaration of Independence's list of grievances prominently featured King George's refusal to allow the colonies to establish courts free from his control.

My perspective is a little more recent. It comes from twenty years as a lawyer in North Carolina.

You've heard my story — probably more often than you'd want. I grew up in a small mill town — my parents worked in the mills; my grandparents worked in the mills. And I worked in the mill on my summer vacations. I was the first in my family to go to college; and then I was lucky enough to go to law school.

My great privilege as a lawyer was to fight for people like those I grew up with. People who look out for one another, who are honest, who raise their families as best they can. People whose lives were devastated by the wrongdoing of big corporations and insurance companies.

I was able to stand up for them and provide them with a voice. I saw first hand how fair and impartial courts can right these wrongs.

One of my clients was Josh Howard, a little boy whose parents were killed by a textile company delivery truck.

The company paid its drivers on the basis of the number of miles they drove in a twelve-hour period, which encouraged the drivers to drive too many miles in order to maximize their earnings.

The jury awarded both compensatory and punitive damages against the trucking company. That case gave Josh Howard hope for his future.

One of my proudest moments as a US Senator was appointing Josh Howard to West Point. He just graduated and is now a second lieutenant in the Army.

The court's decision also helped prevent more accidents. Trucking companies took notice and began emphasizing driver safety. Some even stopped paying drivers by the mile.

Unfortunately, the insurance company involved in the case did what many powerful businesses do: it hired lobbyists and got a change in the law.

That change made it just about impossible to obtain an award of punitive damages against a company on the basis of an employee's actions.

It would have prevented any award of punitive damages in Josh Howard's case, and eliminated any incentive for the trucking companies to correct their dangerous practices. That taught me an important lesson about the vulnerability of the courts to powerful interests.

Josh Howard's name doesn't appear in any law school case books. But behind every case — famous and unknown — are individuals just like him.

People who turned to the courts for protection. Protection of their fundamental rights; protection against abuse of government power; or protection against abuse of corporate power.

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 Oct 23, 2007
 Long Beach, Calif.

For the most part — although not always — our courts have responded.

And so alongside Josh Howard are people like Oliver Brown and his daughter Linda Brown. People like Clarence Earl Gideon. Individuals who had wrongs righted and their lives changed because fair and impartial judges, or juries of their peers, reviewed the law and the evidence and came to a just decision.

This critical role of our courts is threatened as never before. The ability of ordinary people to go to court and obtain justice is under siege. This is no coincidence.

It is part of a calculated political agenda that plays out every day in Congress and the Executive Branch, an agenda designed to put powerful corporate interests ahead of ordinary people.

We see it in budget cuts for day care and student aid and tax cuts for millionaires. We see it in environmental programs that ignore scientific experts and sacrifice our children's health while helping big oil companies. We see it in so-called bankruptcy "reform" that helps credit card companies and hurts ordinary people.

And we see it in the new — and radical — jurisprudence that is being spread through right wing think tanks, media outlets, academics, and even some of our courts.

I call it "protect the powerful" jurisprudence because that is what it is designed to do:

Maximize the constitutional protection for corporations and property rights. Minimize the constitutional commitment to equality. And restrict the power of the federal government to solve the country's problems. Of course, the radicals don't talk that way.

Their jurisprudence is cloaked in abstract legal principles that sound reasonable — strict constructionism, interpretation rather than legislation, original intent, judicial restraint. But the reality simply does not match the rhetoric.

How is it strict constructionism to interpret the Eleventh Amendment to allow States to violate federal law and discriminate with impunity against their own citizens with disabilities?

There is nothing in the amendment's text that supports this result.

I thought strict constructionism meant adherence to the text of the Constitution. But the lesson is clear: when the text doesn't fit the political agenda, the text loses.

Many of the people who claim to oppose judicial legislation are the same ones arguing that the Takings Clause requires property owners to be paid for almost any reduction in property value caused by regulation — no matter how valuable the property remains, no matter how necessary the regulation.

Even Justice Scalia does not argue that expansive new protections for landowners are demanded by the constitutional text. Instead, he points to something he calls "constitutional culture."

That sounds to me more like judicial legislation than interpretation. How do those who demand judicial restraint celebrate the Rehnquist Court, which has struck down Acts of Congress at an unprecedented rate; nearly three dozen since 1995? The lesson is clear: judicial restraint is nice, but it shouldn't get in the way of policy results you want.

None of this should be a surprise.

Much of it was planned out by the Meese Justice Department — the memos are available on the Internet for everyone to see. Their blueprint for transforming judicial decision-making written twenty years ago has been incredibly successful.

Look at what's happening to the First Amendment.

In case after case, conservatives invoke the First Amendment to protect powerful economic interests. They seek to invalidate laws that would lessen the influence of money in politics or expand the diversity of voices heard on media.

In so-called commercial speech cases, they have suggested that the government's power to protect consumers is strictly limited.

Look at the threats to the Equal Protection Clause. And I'm not even talking about Bush versus Gore.

The Fourteenth Amendment was intended to secure equal rights for African-Americans and put an end to discrimination. Today, the right invokes that amendment to stop voluntary efforts to eliminate the effects of discrimination.

Nowhere is the radicals' agenda more apparent than in cases involving judicial access.

Time and time again, they have opposed judicial and legislative attempts to facilitate

Education Roundtable

Oct 23, 2007
Merrimack, N.H.

Community Meeting with John Edwards

Oct 24, 2007
Glenwood, Iowa

Community Meeting with John Edwards

Oct 24, 2007
Sidney, Iowa

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Oct 24, 2007
Shenandoah, Iowa

NEWS HEADLINES

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Edwards Discusses Plan to Connect Hard-Working Americans to Smart Training for Good-Paying, Union Jobs

At California SEIU Event, Edwards Vows To Elect Super-Majorities In House And Senate

Edwards Warns Against Rewriting Rules That Prevent Excessive Media Consolidation

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access to justice of poor, marginalized, and disenfranchised individuals.

Standing doctrine is a shadow of what it once was — ordinary people have a much more difficult time getting into court to challenge government action.

And look at the recent attack on a legal services' funding source brought by a conservative legal foundation.

In the interest of promoting access to justice, all 50 states had enacted IOLTA programs that funded legal services organizations by tapping interest on lawyers' trust accounts. Although the funds in question could not generate income for the lawyers' clients, the foundation nevertheless argued that the program was unconstitutional.

The Supreme Court upheld the program on the obvious grounds that there would be no constitutional violation if the lawyers' clients suffered no financial loss.

The rationale, however, did not persuade the dissenting conservative justices.

To them the IOLTA programs were, in their words, "Robin Hood Takings" designed to help the poor at the expense of the rich.

But where is the real taking? The radicals' approach is actually Robin Hood in reverse — protect the wealthy and the entrenched by taking away the ability of others to seek justice against them in court.

And many conservatives are not embarrassed to claim that the Constitution compels this result.

Finally, there is the so-called "Constitution in Exile" movement, recently chronicled in the New York Times.

As you know, it argues that the Court took a wrong turn seventy years ago when it recognized broad congressional power to address our country's economic challenges.

This movement seeks to return to an era in which the federal government has only limited power to address issues such as workers rights, discrimination, and pollution.

It would be nice if we could think of this movement as an intellectual exercise divorced from the real world — sort of like the flat earth society.

But, the current Supreme Court invalidated a key provision of the Violence Against Women Act on one version of this theory.

And conservative activists are promoting more challenges to federal statutes on this basis.

Of course, attempts to use the Constitution to prevent the federal government from helping ordinary people are not new.

During the Lochner era, conservative courts routinely struck down progressive legislation in the name of constitutional law.

Then as now, many conservatives claimed that striking down such laws was dictated by the law, not their own political preferences.

Then as now we were told that even if the beneficiaries of the Court's actions were inevitably the entrenched and the powerful, this was simply a coincidence.

Here, history is very much on our side. Lochner could not withstand the pressure of the New Deal and industrialization. The Constitution in Exile is just as badly suited to the demands of the new global economy. Neither vision is true to a Constitution built for generations.

You and ACS have an important role to play in the fight to prevent the courts from turning back to the Lochner era.

ACS' Constitution in the 21st Century project can supply the intellectual firepower that we need to win this battle.

I hope you all will get involved in that effort and help to expose what the radical right is attempting to do to our Constitution.

Remember, this isn't a fight about abstract legal principles.

It's a fight about the lives of ordinary people — people like Josh Howard — and whether those people will have a fair chance in our legal system.

But the radical right isn't just trying to win by changing the legal principles that courts apply — it also is working to undermine the independence of our courts.

I can't remember a time in which attacks on courts, led by government officials, were as frequent as they are today.

The chairman of the House Judiciary Committee recently sent a private letter to the Chief Judge of the Seventh Circuit demanding that a panel of that court revise a sentencing decision because he thought it was wrong.

The opinion did not change — in fact the panel added a citation to a Supreme Court decision showing why the chairman was wrong.

But this letter is just the first step in the chairman's announced program of "oversight" of judicial decisions.

After the right's failed effort to force the federal courts to intervene in the tragic case of Terry Schiavo, the House majority leader said ominously that the time will come for the men responsible for this to answer for their own behavior.

His outside allies have been even more extreme in their attacks on our judiciary — Pat Robertson said that judges were a greater threat to America than the terrorists of 9/11.

James Dobson compared judges to the Ku Klux Klan.

One would have thought that our President would have been the first to condemn these attacks. Yet his voice has been oddly silent.

Members of the Supreme Court — from Chief Rehnquist to Justice O'Connor to Justice Breyer — have pointed out that this sort of criticism undermines the independent judiciary that is one of the foundations of our democracy.

As the Chief Justice observed, federal judges were attacked fifty years ago for desegregation, but those actions are now an admired chapter in our nation's history.

Again, there is nothing coincidental about these events.

Just like the actions of King George in the 18th century, they are designed to intimidate the courts — an outrageous effort to eliminate the independence and impartiality that is essential to justice.

To the credit of our judges, there is no indication that any of these attacks have had any impact. But they have to stop.

We have to stand up for judicial independence — and shine a spotlight on these attempts at intimidation.

The third front in this battle for our courts is the one that has received the most attention in the last couple of weeks — the appointment of judges.

As a lawyer, I saw the tremendous difference that a fair, open-minded judge can make in providing justice to ordinary Americans. Although I did not agree with Justice O'Connor's vote in many cases, she generally focused on the facts of each dispute. Some have criticized her because she did not adhere to a grand ideology and generally announced narrow decisions. But she recognized that cases are not about abstract ideological battles.

She understood that they involve real people with real problems who live in real communities across America. People like Josh Howard. And that led her to some great decisions.

She refused to order the elimination of reasonable affirmative action programs that have done so much to eliminate the effects of racism in our country.

She recognized that to uncover sex discrimination we have to give legal protection to whistleblowers, whether they are male or female.

She knew that our political system was being eroded by the corrosive effects of huge contributions, and that campaign finance reform was essential to maintain people's trust in their government.

She defended the right to privacy that is fundamental to Americans.

On the other hand, Justice O'Connor was a leader on the Court in restricting the power of the federal government — especially with respect to the States.

One of the last decisions in this area is interesting because it involved a collision between states' rights and discrimination against the disabled.

Although Justice Stevens wrote the Court's opinion, Justice O'Connor's approach shines through: the Court focused on the particular claims in that case.

That George Lane had to crawl up the courthouse steps to appear in court to answer a criminal charge. That Beverly Jones couldn't really do her job as a court reporter because she could not get into the courthouse.

At least when it came to access to justice, the Court ruled, the discrimination claims could go forward.

Now, President Bush has nominated John Roberts to replace Justice O'Connor.

We don't know very much about Judge Roberts approach.

At the hearing on his nomination to the D.C. Circuit, he said that he had no overarching ideology. And in the first days after he was nominated, the White House painted a picture of a judge's judge, committed to restraint and respect for the judicial role.

But Judge Roberts did hold key legal jobs in the Reagan and first Bush Administration. And the recent release of documents from the Reagan Administration shows a very different young lawyer at work, a partisan for conservative causes.

Someone who opposed efforts to remedy discrimination on the basis of sex and race.

Someone who opposed measures to protect voting rights.

Someone who disagreed with Ted Olson — no liberal himself — in defending Congress's right to strip away courts jurisdiction over controversial subjects.

On almost every issue he dealt with, the New York Times concluded, where there were basically two sides, one more conservative than the other, Judge Roberts advocated the more conservative course. The question now is, who is the real Judge Roberts?

The Senate has a responsibility to find out.

The Judiciary Committee should insist upon access to Judge Roberts writings from his most recent government jobs. Attorney-client privilege should not prevent the U.S. Senate from seeing documents prepared by a lawyer in a high-level political job representing the United States — especially when that lawyer has been nominated to our nation's highest court.

The upcoming hearings should provide answers to some fundamental questions:

Does Judge Roberts still hold today the views he promoted earlier in his career?

Is Judge Roberts committed to implementing the radical protect the powerful jurisprudence or does he recognize the claims of the powerless as well as the powerful?

Does Judge Roberts recognize that cases are about the real lives of real people, and not just abstract legal principles?

The Senate cannot settle for boilerplate answers from a nominee with such a limited record of speaking publicly in his own voice.

We all know how important the Supreme Court is for all of our rights.

At the same time, I don't want you to fall victim to the Beltway idea that fights in Washington are the only way to advance progressive ideas. They're not.

There are other — more direct — ways to reach our goal of helping ordinary Americans.

That's why I am traveling across the country, working to organize and pass minimum wage ballot initiatives in targeted states in 2006.

To help lift up the 36 million Americans who live in poverty every day.

This is the work I am focusing on at the Center on Poverty, Work, and Opportunity at the University of North Carolina.

To ensure that our children have the education they need to compete and thrive in our world, and that our societies have the capability to help everyone — not just those at the top, but also those who are struggling.

All of us must join this fight.

That is why I urge everyone in this room, particularly the young people, to not only to be great lawyers who use courts to right wrongs, but also to be great citizens involved in your communities.

As you will do here at the ACS Convention this weekend, join the political debates in your communities about the issues that matter. Work to help your fellow citizens through the political process — in electing progressive candidates and promoting progressive goals.

That is where the future of our country will be decided. And that is where you can make the greatest contribution of all.

Thank you very much.

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